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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-5506

ORIGINAL COPY

CURTIS BRINTLEY,
Appellant,

v

STATE OF MICHIGAN,
Appellee,

AND

ANNETTE GAIL ALEXANDER (REAL PARTY IN INTEREST)
Appellant,

v

STATE OF MICHIGAN,
Appellee,

(In re Wayne County Prosecutor v Recorder's Court Judge)

MOTION TO AFFIRM dismissal
(AS TO BRINTLEY V MICHIGAN)
AND TO DISMISS
(AS TO ALEXANDER V MICHIGAN)

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NOW COME WILLIAM L. CAHALAN, Prosecuting Attorney for Wayne County, EDWARD REILLY WILSON, Chief Appellate Attorney, and TIMOTHY A. BAUGHMAN, Assistant Prosecuting Attorney, and pursuant to Rule 16 moves to affirm Brintley v Michigan, and pursuant to Rule 16(a) to dismiss Alexander v Michigan, and as reasons say:

1. The issues are indeed substantial. This Court has granted certiorari in two cases presenting a similar double jeopardy issue. Busic v United States, No. 786020, and LaRocca v United States, No. 786029, cert granted on June 4, 1979.

2. Appellee submits that this Court should affirmin Brintley v Michigan because the Michigan Supreme Court correctly resolved the question:

A) THE DOUBLE JEOPARDY CLAUSE IS NOT A SUBSTANTIVE RESTRICTION ON THE POWER OF THE LEGISLATURE TO DEFINE CRIME AND ORDAIN PUNISHMENT

". . .(T)he power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment." United States v Wiltberger, 5 Wheat 76, 95, 5 L Ed 37, 42 (1820). As stated in Brown v Ohio, supra, the double jeopardy clause:

> . . . serves principally as a restraint on courts and prosecutors. The legislature remains free under the double jeopardy clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.
> 53 L Ed 2d at 193-194.

Where the issue is substantive double jeopardy, that is, cumulative punishment arising from one prosecution, rather than procedural double jeopardy, that is, the question of successive prosecutions, ". . . the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense." Brown v Ohio, supra at 194 (emphasis added).[1/] The proposition is also made plain in Comment: Twice in Jeopardy, 75 Yale L J 262 (1965). The comment flatly states that multiple punishment is not a limitation on the legislature; indeed, that it "would be absurd as a substantive limitation on the legislature." In a section entitled "Legislative Intent Determines the Number of Convictable Offenses" the comment says:

> When the legislature clearly indicates in a statute its intent with respect to the cumulation of convictions, the court's task of construction is at an end. And if legislative intent, though not proclaimed in the statute, is nonetheless perfectly clear from legialative history, the legislature's purpose should be honored. But in the vast majority of cases, unequivocal legislative intent

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1/ Brown v Ohio, 53 L Ed 2d at 195, fn 6, demonstrates that though double jeopardy may prevent a successive prosecution in certain circumstances, it would not necessarily prevent cumulative punishment at one trial under the same circumstances. Note also Ennis v State, 23 Cr L Rptr 2521 (Fla Ct App, 8-2-78), where the court held that Brown v Ohio and Harris v Oklahoma, 432 US 682; 97 S Ct 2919; 53 L Ed 2d 1054 (1978) were not inconsistent with conviction and punishment at one trial for both felony-murder and robbery, though under Florida law it is necessary to prove the underlying felony to prove felony-murder, the court being of the view that Brown and Harris do not control cumulative punishment cases.

> cannot honestly be found in the statute or its official history. Thus the court must ordinarily resort to presumptions about legislative intent—cannons of construction—to determine the unit of conviction created by a statute (emphasis added).[2/]

Appellant states that in relying on legislative intent the Michigan Supreme Court failed to complete the analysis, for legislative intent should be looked to in avoidance of the inquiry, not to end it. If multiple punishment was not intended, the inquiry ends, Simpson v United States, ___ US ___; 55 L Ed 2d 70 (1977); but if it was, then the analysis proceeds. Appellee submits that the analysis is actually three-fold. If multiple punishment was not intended, the inquiry ends. If it was, the inquiry ends. If it is unclear, then "the court must ordinarily result to presumptions about legislative intent—canons of construction—to determine the unit of conviction created by a statute." Comment: Twice in Jeopardy, supra. Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L J 513, 516 (1949) states it thusly:

> In the overwhelming number of cases, however, no clear legislative intent exists. The task of ascertaining whether one or several offense schemes should apply then becomes a judicial one which the courts constantly perform behind the veil of procedural tests (emphasis added).

Even Chief Justice Warren, dissenting in Gore, supra, recognized that "In every instance the problem is to ascertain what the legislature intended." The Chief Justice was not speaking merely in avoidance of the analysis if the legislature did not intend multiple punishment; plainly from his opinion he would have also considered the matter closed had he found that the legislature did intend to cumulate punishment.

Appellee would summarize his position by quoting from 65 Yale L J 339, 363-364:

2/ That the test in Blockburger is a "canon of construction" for use when legislative intent is unclear is made plain in Iannellu v United States, 420 US 770, 784 (fn 17); 95 S Ct 1284; 43 L Ed 2d 616 (1975), where Blockburger is analogized to Wharton's Rule: "The test articulated in Blockburger v United States . . . serves a generally similar function (to Wharton's Rule) of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction."

> The primary substantive problem is one of legislative intent, not legislative power, for the legislature can award as many different penalties as it deems desirable for a given act or transaction, or any aspect of an act or transaction, as long as the statute accords substantive due process of law and avoids the eighth amendment prohibition of cruel and unusual punishments. This authority is inherent in the power to make conduct criminal and to penalize it and is not limited in any meaningful sense by the concept of double jeopardy (emphasis added).

The Michigan legislature intended cumulative punishment for felony-firearm and the felony. It has the power to so provide. The judicial inquiry should be ended upon that recognition.

B) CONVICTION AND PUNISHMENT FOR FELONY-FIREARM AND THE FELONY IS PERMISSIBLE UNDER BLOCKBURGER

Even assuming that substantive double jeopardy acts as a check on legislative authority and that the clear legislative intent to create separate crimes and separate punishment does not control the inquiry, then appellee would argue that Blockburger, supra, supports both convictions

The leading case in this area of double jeopardy is Blockburger v United States, 284 US 229 (1931) where the defendant was charged with five counts of violating the federal narcotics law. Defendant was convicted on three counts and given a five-year sentence and $2,000 fine on each, the terms to run consecutively. One count on which defendant was convicted charged a sale of narcotics not in or from the original stamped package; another count on which defendant was convicted charged the same sale of the same narcotics as having not been made pursuant to a written order of official form by the purchaser. The Court stated the issue succinctly:

> Here there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one. 284 US at 304.

In answering that two offenses were committed by the defendant's single act, the Court noted:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other... Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed (Emphasis added). 284 US at 304.

The principle announced in Blockburger was followed and reaffirmed in Gore v United States, 357 US 386 (1958). In considering the continued vitality of Blockburger in the double jeopardy area, Justice Frankfurter wrote:

> Finally, we have pressed upon us that the Blockburger doctrine offends the constitutional prohibition against double jeopardy. If there is anything to this claim it surely has long been disregarded in decisions of this Court, participated in by judges especially sensitive to the application of the historic safeguard of double jeopardy. 357 US 392.

The test announced in Blockburger and reaffirmed explicitly in Gore has been analyzed and employed on numerous occasions by numerous courts. See, e.g., Simpson v United States, 55 L Ed 2d 70 (1978); Brown v Ohio, 432 US 161 (1977); Jeffers v United States, 432 US 137 (1977); Iannelli v United States, 420 US 770 (1975)[3/]; United States v Wright, ___ F 2d ___, 23 Cr L R 2521 (8th Cir 1978); Kowalski v Parratt, 533 F2d 1071 (8th Cir 1976), cert den 429 US 844 (1976). As the Supreme Court of Nebraska noted in State v Saxon, 193 Neb 278, 226 NW 2d 765 (1975), where the defendant was convicted of robbery and the use of a firearm in the commission of a felony:

> It is well settled that the test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count. The test is whether some additional evidence is required to prove one of the offenses than is necessary to prove one of the other offenses. 226 NW 2d at 767 (Emphasis added).

In Kowalski v Parratt, supra the meaning of the Blockburger test was even more particularly described. When construing the same Nebraska statutes involved in State v Saxon, supra, the Kowalski court made the following observations:

3/ Fn 17, 420 US at 784 makes it clear that Blockburger is to be applied factually rather than abstractly: "As Blockburger and other decisions applying its principle reveal . . . the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." (Emphasis added)

> Although the appellant assumes that Count II required proof of the robbery alleged in Count I, that is not the case. The weapons statute is satisfied by proof that a weapon was possessed or used during any felony. Count II simply alleged that the firearm was used 'in the commission of the crime set forth in Count I.'
>
> Thus the district court is clearly correct that in the abstract these statutes define two distinct crimes. However, petitioner asserts that double jeopardy claims should be assessed in light of the particular facts of each case. Here it is undisputed that petitioner used a firearm to create the fear necessary to carry out the robbery. Thus, petitioner argues, to prove the elements of this particular robbery the state also was "required" to prove all of the elements of the Count II offense. This is not a novel reading of Blockburger. In the case of Michener v United States, 157 F 2d 616 (8th Cir 1946), this court adopted just that view . . . .
>
> The court therefore proceeded to examine the facts of the case and concluded that under the circumstances proof of Count I also established Count II. On this basis, the court found that the sentences violated the Double Jeopardy Clause.
>
> The Supreme Court, however, granted certiorari and reversed . . . . The one paragraph per curiam opinion gave no reasoning but simply cited Blockburger and Albrecht as controlling precedents. . . .
>
> Based on these and other cases the federal courts now recognize that "in order to support a claim of double jeopardy it must be shown that the offenses charged were in law and fact the same offense." 533 F2d at 1073-1074.

In conclusion, the Court of Appeals for the Eighth Circuit noted:

> We have already observed that the two statutes at issue here have different elements as a matter of law, although a common element as a matter of fact. Different policies come into play when a criminal uses or possesses certain deadly weapons during a crime than when he relies upon mere threats, his bare hands, or upon other less dangerous devices. Since the two crimes at issue do not in law constitute the same offense, double jeopardy is inapplicable. 533 F2d at 1074.

Thus, the Michigan Supreme Court correctly decided the issue.

3. Alexander v Michigan should be dismissed under Rule 16(a). The prosecution filed what is called in Michigan a complaint for superintending control to the Michigan Court of Appeals to force the trial judge to sentence as required by the statute. The Michigan Supreme Court has now decided only that the trial judge erred in refusing to sentence. Whether the conviction itself will be affirmed remains to be seen, as defendant's appeal is presently pending in the Michigan Court of Appeals. The appeal is thus not from a final judgment: Market St. Ry Co. v Railroad Commission of State of Cal., 324 US 548 (1945); Costarelli v Massachusetts, 421 US 193 (1975).

RELIEF

WHEREFORE, appellee, the State of Michigan, requests that Alexander v Michigan be dismissed, and that Brintley v Michigan be affirmed or probable jurisdiction noted.

Respectfully submitted,

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